

2013 WL 6923044 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

Margaret Ann HUNTER, Plaintiff-Appellant,
v.
ANCHOR BANK, N.A., and Emigrant Mortgage Company, Inc., Defendants-Respondents.

No. A13-0515.
June 5, 2013.

Brief, Addendum and Appendix of Respondent Emigrant Mortgage Company, Inc.

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***1 STATEMENT OF THE ISSUES**

I. IS THE SHERIFF'S SALE VALID IN LIGHT OF THE FACT TWO PROPERTIES WERE SOLD AS ONE AT THE SALE?

The Court answered in the affirmative finding that there was not error or good cause to void the sale.

Apposite Authority

1. *Phelps v. Western Realty Co.*, 89 Minn. 319, 94 N.W. 1085 (Minn. 1903).
2. *Clark v. Kraker*, 51 Minn. 444, 53 N.W. 706 (1892).
3. *Willard v. Finnegan*, 42 Minn. 476, 44 N.W. 985 (1890).
4. *Ruiz v. 1st Fidelity Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013).

II. ARE COUNTS ONE THROUGH FOUR OF APPELLANT'S COMPLAINT BARRED BY THE APPLICABLE SIX-YEAR STATUTE OF LIMITATIONS PROVIDED BY MINNESOTA STATUTES SECTION 541.05?

The Court held in the affirmative determining that the causes of action raised by Appellant are subject to the six-year statute of limitations and were not timely as a result.

Apposite Authority

1. *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 275 N.W. 694 (1937).
2. *Entzion v. Illinois Farmers Ins. Co.*, 675 N.W.2d 925 (Minn. Ct. App. 2004).
3. *Weavewood, Inc. v. S&P Home Investments, LLC, et. al.*, 2013 WL 599125 (Minn. Ct. App. Feb. 19, 2013) (unpublished decision).

III. WAS APPELLANT ENTITLED TO AMEND HER COMPLAINT EVEN THOUGH THE PROPOSED AMENDMENTS WERE FUTILE?

The Court held in the negative finding that although Defendants would not be prejudiced by the amendment, the proposed amendments would not survive summary judgment and, as such, amendment was not warranted.

***2** *Apposite Authority*

1. *Lumberman's Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580 (Minn. Ct. App. 1991), review denied (Minn. Apr. 1, 1991).
2. *Matter of Condemnation of Certain Lands in City of White Bear Lake by City of White Bear Lake Housing and Redevelopment Authority*, 555 N.W.2d 541 (Minn. Ct. App. 1996).
3. *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267 (Minn. 2008).

IV. WAS EMIGRANT ENTITLED TO DISMISSAL OF APPELLANT'S COMPLAINT ON THE MERITS OF EACH CAUSE OF ACTION?

The Court dismissed Count 4 (Mutual Mistake) and Count 5 (Set Aside)¹ on the merits of each cause of action, but did not address Count 1 (Fraud and Misrepresentation), Count 2 (Negligent Misrepresentation), and Count 3 (Promissory Estoppel).²

Apposite Authority

1. *Household Finance Corp. v. Pugh*, 288 N.W.2d 701 (Minn. 1980).

2. *Nichols v. Shelard Nat. Bank*, 294 N.W.2d 730 (Minn. 1980).

STATEMENT OF THE CASE

Appellant, Margaret Ann Hunter (“**Hunter**” or “**Appellant**”), commenced an action on August 14, 2012 seeking to invalidate a mortgage foreclosure sale completed by Emigrant Mortgage Company, Inc. (“**Emigrant**”). (Appellant's Appendix (“App”) pgs. 1-8.) As a part of that action, Hunter brought a Motion to enjoin the expiration of *3 the redemption period, which was granted by the district court on August 21, 2012. (Emigrant's Appendix (“E-App”) pg. 004.) The district court also required Hunter to post a bond in the amount of \$10,000.00 with the Washington County Court Administrator, which Hunter did. (Id.) On November 28, 2012, the Respondents brought Motions to Dismiss or for Summary Judgment in the alternative. Hunter also brought a Motion to Amend the Complaint and Vacate the \$10,000.00 Bond. The district court granted Respondents' Motions and denied Appellant's Motion on January 24, 2013. (Appellant's Addendum (“Add”) pgs. 1-18.) Hunter appeals various parts of that Order.

On March 29, 2013, Hunter brought a Motion for Stay of Execution of Judgment before the district court. (E-App at pgs. 062-065.) On April 16, 2013, the court granted that motion, but required Hunter to post security in the amount of \$40,000.00 with the court. (Id.) The court required Hunter to post the security within two weeks of the order, which was April 30, 2013. (Id.) To date, Hunter has not posted that security. On May 13, 2013, Hunter filed a Motion to Stay Execution of Judgment Pending Appeal with this Court asking the Court to reconsider the district court's imposition of the \$40,000.00 security. (Appellant Margaret Ann Hunter's Motion to Stay Execution of Judgment Pending Appeal, dated May 13, 2013.) Emigrant responded, opposing that Motion. The Motion is currently pending before the Court.

STATEMENT OF THE FACTS

On February 6, 2004, Hunter executed and delivered a promissory note to Anchor Bank, West St. Paul, NA (“Anchor Bank”) in the original principal amount of \$265,000.00 (“Note”). (E-App at pg. 001.) In order to secure the indebtedness owed to *4 Anchor Bank under the Note, Hunter executed and delivered a mortgage to Anchor Bank, dated February 6, 2004 (“**Mortgage**”), encumbering real property in Washington County legally described as Lot 37, Riverwood Acres No. 2 (commonly known as 1539 Cedar Lane, Newport, MN) (“**Newport Property**”) and encumbering real property in and Dakota County legally described as Lot 3, Block 1, Schindeldecker 2nd Addition (commonly known as 6020 Asher Court, Inver Grove Heights, MN) (“**Inver Grove Property**”). (Id. at pgs. 005-028.) The Mortgage was filed with the Washington County Recorder's Office on February 12, 2004 as Document No. 3422717 and filed with the Dakota County Recorder's Office on September 2, 2004 as Document No. 2244280. (Id.) Subsequent to the execution of the Note and Mortgage, Anchor Bank transferred its interest in the Note and Mortgage to Emigrant by means of an assignment of mortgage, dated February 6, 2004, and recorded in Washington County on February 12, 2004 as Document No. 3422718 and recorded in Dakota County on September 2, 2004 as Document No. 2244281 (“Assignment”). (Id. at pg. 002.)

The Mortgage contained a mortgage rider referred to as Rider “E.” (Id. At pg. 025.) Rider “E” was executed by Hunter on February 6, 2004 and recorded along with the Mortgage in Washington County on February 12, 2004. (Id.) A certified copy

of the Mortgage was obtained from the Washington County Recorder's Office and subsequently recorded in Dakota County on September 2, 2004. (Id.) Hunter signed an additional copy of Rider "E" on February 27, 2004. (Id. at pg. 002.)

On or about August 1, 2005, Hunter sent a letter to Emigrant requesting that Emigrant remove the Inver Grove Property as "cross-collateral" from the Mortgage. (Id. *5 at pg. 039.) Hunter defaulted under the terms of the Note and Mortgage for failure to make timely monthly payments beginning November 1, 2010. (Id. at pg. 003.) As a result of Hunter's default, Emigrant commenced non-judicial foreclosure proceedings of the Mortgage. (Id.) The requisite Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage ("**Notice of Pendency**") was recorded in Washington County on July 22, 2011 as Document No. 3848422 and in Dakota County on July 25, 2011 as Document No. 2811288. (Id.)

A foreclosure sale was scheduled to be held by the Washington County Sheriff on September 9, 2011. (Id. at pgs. 040-061.) Emigrant published notice of the foreclosure sale in Washington County for six consecutive weeks, beginning on July 28, 2011. (Id.) On or around August 22, 2011, Hunter exercised her right under [Minnesota Statutes § 580.07](#) to postpone the foreclosure sale for five months. (Id.) The foreclosure sale was postponed for five months and was held by the Washington County Sheriff on February 9, 2012 ("Sale"). (Id.) The Sale was memorialized by the Washington County Sheriff in that certain Sheriff's Certificate of Sale and Foreclosure Record ("**Sheriff's Certificate**") dated February 9, 2012, and recorded in Washington County on February 9, 2012 as Document No. 3874379. (Id.) The Sheriff's Certificate was also recorded in Dakota County on February 10, 2012 as Document No. 2848417. (Id.) Emigrant was the highest bidder at the Sale with a bid of \$287,431.26. (Id.) Interest continues to accrue at a default rate of 16% resulting in a per diem interest amount of \$125.99. (Id.) The redemption period following the Sale was originally set to expire on March 15, 2012. (Id.)

*6 STANDARD OF REVIEW

On appeal from a summary judgment, the appellate court is tasked with reviewing the record below for the purpose of answering: (1) whether there are any genuine issues of material fact and (2) if the district court erred in its application of the law. [Osborne v. Twin Town Bowl, Inc.](#), 749 N.W.2d 367, 371 (Minn. 2008). In general, on review, the evidence must be viewed in the light most favorable to the party against whom summary judgment was granted and questions of law must be reviewed *de novo*; however this Court has also opined that summary judgment should be affirmed if it can be sustained on any ground. [Winkler v. Magnuson](#), 539 N.W.2d 821, 825, 828 (Minn. Ct. App. 1995). Furthermore, the appellate court may only reverse a lower court's decision to grant or deny equitable relief if it finds the lower court clearly abused its discretion in making that decision. [Septran, Inc. v. Independent School Dist. No. 271, Bloomington, Minn.](#), 555 N.W.2d 915, 918 (Minn. 1996).

In reviewing a district court's decision regarding amendment of a pleading, the Court of Appeals uses an abuse of discretion standard. [Johns v. Harborage I, Ltd.](#), 664 N.W.2d 291, 295 (Minn. 2003). The decision whether to allow an amendment is within the discretion of the district court and cannot be reversed unless there is a "clear abuse of discretion." *Id.*

ARGUMENT

Hunter commenced this action after receiving the benefit of the \$265,000.00 in loan proceeds, proceeds she received in 2004. After requesting a loan from Anchor Bank and knowingly executing a mortgage that encumbered the two parcels of real property at *7 issue in this case, she defaulted under the terms of the Mortgage and now seeks to reform the contract she entered into over nine years ago. Hunter experienced a similar form of "buyer's remorse" in 2005 when she sent a letter to Emigrant requesting a release of the cross-collateral; namely the Inver Grove Property. Hunter did not offer to return any of the \$265,000.00 in loan proceeds in exchange for a release and her request was denied. Coincidentally, the filing of this action coincided with the completion of the foreclosure process following her default and on the eve of the transfer of title to Emigrant.

Because Hunter waited over eight years to bring this action, her claims have been barred by Minnesota's Statute of Limitations. Hunter's claims also run afoul of Minnesota's Statute of Frauds, Parole Evidence Rule, and Credit Agreement Statute. Hunter's claims infer she didn't understand what property was being encumbered by the Mortgage or that she was told the Mortgage would

only encumber one property. These claims are without support. Lastly, Hunter is unable to show that any alleged deficiencies in the foreclosure process prejudiced her rights of redemption. The Court has enjoined the redemption period from expiring during the pendency of this action which allows Hunter the continuing opportunity to successfully redeem from Emigrant's foreclosure proceedings.

I. THE DISTRICT COURT PROPERLY UPHELD THE MORTGAGE FORECLOSURE SALE BECAUSE APPELLANT FAILED TO ESTABLISH GOOD CAUSE SUFFICIENT TO VACATE THE SALE.

In Count 5 of the Complaint, Appellant alleges that the February 9, 2012 Sale should be set aside due to Emigrant's failure to comply with [Minnesota Statutes §§ 580.03, 580.06, and 580.08 \(2010\)](#). During the course of litigation, Hunter narrowed the *8 scope of her allegations and now appears only to challenge the sale with respect to [§ 580.08](#), the statutory provision related to the sale of separate tracts of land. (Appellant's Brief at pgs. 5-11.) Appellant argues Emigrant did not strictly comply with [§ 580.08](#), the district court improperly determined Hunter was not prejudiced, and that the sole way to cure this alleged defect is through the passage of time. (Id.)

Appellant's argument hinges primarily on the recent Minnesota Supreme Court opinion in which that Court determined that all assignments of mortgage must be recorded prior to commencement of a foreclosure by advertisement and that strict compliance with [Minnesota Statutes Section 580.02\(3\)](#) is required. [Ruiz v. 1st Fidelity Loan Servicing, LLC](#), 829 N.W.2d 53, 57 (Minn. 2013). Emigrant does not dispute that this is the holding of Ruiz. This holding, however, was limited to an analysis of [§ 580.02\(3\)](#) and did not reach issues related to the overarching foreclosure by advertisement process outlined in Chapter 580 including whether strict compliance of [§ 580.08](#) is required.

[Section 580.08](#), in its current linguistic form, dates back to 1863. Gen. St. 1863, Ch. 81 § 9. Since 1863, the applicable statute has read:

If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale.

Compare Id. with Minn. Stat. § 580.08 (2010). Based upon the exact same language contained in [§ 580.08](#), the Supreme Court has held that a sale of separate tracks sold as one should be vacated only upon a showing of “fraud, prejudice or other good cause.” *9 [Phelps v. Western Realty Co.](#), 89 Minn. 319, 324, 94 N.W. 1085, 1087 (Minn. 1903); [Clark v. Kraker](#), 51 Minn. 444, 448, 53 N.W. 706, 707 (1892); [Willard v. Finnegan](#), 42 Minn. 476, 478-79, 44 N.W. 985, 986 (1890). A sale for more than one farm or tract is not void, but only voidable upon the above showing. *Id.* Contrary to Appellant's arguments, the district court did not disregard the holdings in [Jackson v. Mortgage Electronic Registration Systems, Inc.](#), 770 N.W.2d 487 (Minn. 2009) or Ruiz, which held that strict compliance is required in various foreclosure by advertisement statutes. Rather, the facts in Phelps, Clark and Willard align with the facts of this case, the holdings, which do not void a sale for discrepancies in [§ 580.08](#), are directly applicable to this case, and these holdings do not contradict the decisions in Jackson or Ruiz because neither of these cases addresses [§ 580.08](#), the statute at issue in this lawsuit. [Phelps](#), 89 Minn. at 324, 94 N.W. at 1087; [Clark](#), 51 Minn. at 448, 53 N.W. at 707; [Willard](#), 42 Minn. at 478-79, 44 N.W. at 986.

Despite Hunter's request to set aside the sale, she has failed to adequately explain how she was prejudiced or what other good cause exists to vacate an otherwise valid sale. Hunter claims she is unable to redeem the Inver Grove Property because the two properties were sold together. (Appellant's Brief at pgs. 8-9.) This is simply untrue. There is no law prohibiting separate redemptions of properties even if they are sold together and Emigrant has been willing to allow Hunter to redeem the Inver Grove Property at any point during the litigation. Further, Hunter has failed to establish she has the money to redeem the Inver Grove Property. In fact, any claim that Hunter has the money to redeem is disingenuous given her inability to procure a letter of credit in the *10 amount of \$40,000.00, which was required by the district court as a condition of its Order and Memorandum

of Law, dated April 16, 2013. In order to establish prejudice, certainly Hunter must be required to show the Court she has the capability to redeem and is being prevented from doing so. Hunter has established neither.

Because the case law interpreting [§ 580.08](#) and the status of a sale in which more than one tract of land is sold together is clear and requires the challenging party to establish good cause in order to vacate the sale, the district court's order should be upheld. Hunter has failed to establish any reason, let alone good cause, requiring the sale to be vacated. For this reason, the sale is valid and the district court's order should be affirmed.

II. APPELLANT FAILED TO COMMENCE THE DISTRICT COURT ACTION WITHIN THE APPLICABLE STATUTE OF LIMITATIONS AND THE DISTRICT COURT PROPERLY DISMISSED HER CLAIMS AS A RESULT.

In Counts 1 through 4 of Hunter's Complaint, Hunter asserts claims that the Inver Grove Property was not supposed to be encumbered by the Mortgage. (App at pgs. 3-5.) As an initial matter, the Court should note that, regardless of how it decides to handle the statute of limitations argument addressed below, it can and should affirm the dismissal of these four causes of action. It is well established that this Court may affirm a district court's decision on any justifiable grounds. [Winkler v. Magnuson](#), 539 N.W.2d 821, 828 (Minn. Ct. App. 1995).

The district court's dismissal of Counts 1-4 was appropriate under Minnesota's Credit Agreement Statute and the parol evidence rule. (Add at pgs. 13-14.) The district ^{*11} court determined that any oral representations allegedly made to Hunter by Anchor Bank at the closing were inadmissible because the mortgage is clear and unambiguous, constitutes a credit agreement under Minnesota law, and there is no signed writing between the parties agreeing to release the Inver Grove Property from the Mortgage. (Id. at 14.) Hunter did not dispute Emigrant's argument at the district court level and did not appeal the district court's decision on this issue. As such, even if the Court determines there is no six-year statute of limitations applicable to Counts 1-4 of the Complaint, the district court properly dismissed these four counts on alternative grounds and that dismissal must be affirmed.

With regards to the statute of limitations argument interposed by Emigrant, Hunter seems to admit she would be precluded from commencing an action requesting affirmative relief with respect to her claims of Fraud and Misrepresentation (Count 1), Negligent Misrepresentation (Count 2), Promissory Estoppel (Count 3), and Mutual Mistake (Count 4) because she did not do so within the applicable six-year statute of limitations. Hunter argues, however, that she is not affirmatively asserting these four causes of action, but rather only raising them as a defense to Emigrant's foreclosure action. (Appellant's Brief, pgs. 12-13.) As such, Hunter maintains the applicable six-year statute of limitations does not bar her claims. (Id.)

[Minnesota Statutes § 541.05\(1\)](#) requires that claims brought under the terms of a contract or other obligation, express or implied, be filed within six years. (2012). [Minnesota Statutes § 541.05\(6\)](#) requires that an aggrieved party commence an action for fraud within six years from the date of discovery of the facts constituting the fraud. ^{*12} Statutes of limitation are instituted for "reasons of private justice and public policy." [Bachertz v. Hayes-Lucas Lumber Co.](#), 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). Enforcing statutes of limitation avoids fraud, never-ending litigation for the parties to the transaction and "prevents a party from delaying an action until papers are lost, facts are forgotten, or witnesses are dead." [Karels v. Am. Family Mut. Ins. Co.](#), 371 N.W.2d 617, 619 (Minn. Ct. App. 1985; see also [Entzion v. Illinois Farmers Ins. Co.](#), 675 N.W.2d 925, 928 (Minn. Ct. App. 2004).

Emigrant understands a decision was handed down by this Court earlier this year and that the decision contravenes the arguments Emigrant made to the district court regarding whether the allegations made by Hunter are barred by the six-year statute of limitations provided in [§ 541.05](#). See [Weavewood, Inc. v. S & P Home Investments, LLC, et. al.](#), 2013 WL 599125 (Minn. Ct. App. Feb. 19, 2013) (unpublished decision). Emigrant respectfully disagrees with the Court's decision in that case and asks that the Court reconsider its position. Under the Court's position in [Weavewood](#), the parties could have proceeded under the terms of this particular mortgage contract for nearly thirty years under Emigrant's belief that the contract was valid and enforceable. Plausibly, Hunter could have made her mortgage payments for over 29 years and defaulted on the very last mortgage payment.

If Emigrant determined to foreclose the mortgage at that point in time, which would have been its right, Hunter would be able to raise fraud as a defense to that foreclosure despite the fact she performed on the contract for 29 years. Arguably, Emigrant could be forced to return the payments Hunter made to it and/or lose its security interest in the Property based upon events that occurred 29 years *13 earlier. Allowing a party to “defend” a foreclosure action by claiming fraud, promissory estoppel, etc. 29 years after the mortgage was originated does not comport with the long standing reasons behind the imposition of a statute of limitations. *Bachertz*, 201 Minn. at 176, 275 N.W. at 697; *Entzion*, 675 N.W.2d at 928.

To the extent the Court upholds its decision in *Weavewood*, dismissal of Counts 1- 4 of the Complaint is appropriate with respect to Hunter's request for monetary compensation. Hunter's Complaint requests damages from the Defendants in excess of \$50,000.00. (App at pg. 7.) The Court in *Weavewood* is clear that an affirmative claim will be barred by a statute of limitations unless it is raised as a “pure defense.” 2013 WL 599125 at *1. A request for monetary relief does not constitute a pure defense and, as such, is subject to the applicable statute of limitations. *Id.* at *4. Because Hunter commenced her cause of action over 8 years after the origination of the Mortgage, Hunter's request for monetary relief is barred by § 541.05 and the district court's dismissal of this request was proper.

For the foregoing reasons, Emigrant requests the Court reconsider its decision in *Weavewood* and uphold the district court's dismissal of Counts 1-4 of Hunter's Complaint because the claims were not timely raised under the applicable statute of limitations. Even if the Court disagrees with Emigrant's position and determines Hunter's action was timely commenced, dismissal of these counts is still appropriate under the district court's order, which also dismissed Counts 1-4 under Minnesota's Credit Agreement Statute and the parol evidence rule, issues that were not raised by *14 Hunter on appeal. Finally, Hunter's request for monetary relief cannot be construed as a pure defense under *Weavewood* and the district court properly dismissed Hunter's claim.

III. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO AMEND THE COMPLAINT BECAUSE THE AMENDMENTS WERE FUTILE.

Appellant improperly argues that the district court denied her Motion to Amend on the basis that Respondents would be prejudiced by the amendment. (Appellant's Brief at pgs. 15-16.) The district Court did not deny the amendment on these grounds, however. Rather, the district court denied Hunter's Motion because the proposed amendments could not withstand summary judgment. (Add at pgs. 7-8.) In other words, the proposed amendments were futile.

A court may deny an amendment to assert an additional claim where the amendment would serve no legal purpose. *Lumberman's Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580, 584 (Minn. Ct. App. 1991) (review denied (Minn. Apr. 1, 1991); *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. Ct. App. 1987). In deciding whether to allow an amendment to a pleading, the district court must consider whether the moving party has presented sufficient evidence to support its proposed amendment. *Matter of Condemnation of Certain Lands in City of White Bear Lake by City of White Bear Lake Housing and Redevelopment Authority*, 555 N.W.2d 541, 545 (Minn. Ct. App. 1996). A denial of a motion to amend is proper when the movant fails to demonstrate the existence of evidence to support the allegations the movant seeks to amend. *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 272 (Minn. 2008); *Stead-Bowers v. Langley*, 636 N.W.2d 334, 341 (Minn. Ct. App. 2001) *15 (rev. denied (February 19, 2002)). Additional claims that cannot be maintained or that could not survive summary judgment are properly denied by the court. *Voicestream*, 743 N.W.2d at 272; *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 299 (Minn. Ct. App. 1986).

Hunter sought to amend her Complaint to add three causes of action; reformation of mortgage, equitable estoppel, and the Truth-in-Lending Act (“TILA”). (App at pgs. 9-19.) The district court properly held that all evidence regarding alleged oral promises made by Anchor Bank was inadmissible under Minnesota's Credit Agreement Statute and the parol evidence rule. (Add at pgs. 13-14.) Hunter has not challenged that decision on appeal. As such, any evidence regarding terms not included in the fully integrated writing, the Mortgage, is inadmissible. Hunter's proposed amendments cannot survive summary judgment, are futile, and the district court properly dismissed them.

Additionally, with respect to the proposed TILA claim, this Court has held that the assertion of a TILA violation is a recoupment defense and that such a defense cannot be pled in response to a mortgage foreclosure action where the lender seeks recovery of the property and not damages. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 44 (Minn. Ct. App. 2010); *Stearns Bank, N.A. v. Burnes-Leverenz, et. al.*, 2012 WL 3023405, *8 (Minn. Ct. App. July 23, 2012) (unpublished). Appellant cites to the case of *Household Finance Corp v. Pugh*, 288 N.W.2d 701, 707 (Minn. 1980) for the proposition that she timely brought her TILA claim/recoupment defense. (Appellant's Brief at pg. 16.) Appellant entirely fails to address this Court's decisions in *Molde* and *Stearns Bank*, however, which provide one key distinction from the facts in *Household*. In *Household*, the bank *16 brought a lawsuit to recover a monetary judgment from the debtors based upon obligations arising under a note. *Household*, 781 N.W.2d at 702. In *Molde* and *Stearns Bank*, the facts involved the assertion of a recoupment defense in response to a mortgage foreclosure via advertisement in which the respective lenders were seeking recovery of the property securing the debt obligation, not monetary recovery. *Molde*, 781 N.W.2d at 44; *Stearns Bank*, 2012 WL 3023405 at *8.

In this action, Emigrant commenced foreclosure by advertisement proceedings and, as a result, Emigrant has waived its right to any sort of monetary judgment against Hunter. Minn. Stat. § 582.30, subd. 2 (2010). Therefore, Hunter is estopped from asserting a TILA cause of action and amending the Complaint to do so serves no legal purpose. *Stearns Bank*, 2012 WL 3023405 at *8. Because the district court properly determined that Hunter's proposed amendments to the Complaint could not withstand summary judgment, its denial of her Motion was proper and the district court's decision should be affirmed.

IV. ALTHOUGH THE DISTRICT COURT DID NOT REACH ALL OF THE CAUSES OF ACTION ON THEIR MERITS, THE COURT SHOULD UPHOLD THE DISTRICT COURT'S DISMISSAL OF COUNTS 1-4 OF APPELLANT'S COMPLAINT ON THE MERITS.

Although the district court's order only substantively addresses Hunter's claims for Mutual Mistake (Count 4) and Set Aside (Count 5)³, Emigrant fully briefed the remaining causes of action (Counts 1-3) in its Memorandum in Support of Its Motion to Dismiss or Summary Judgment in the Alternative. As previously *17 outlined, this Court can uphold a district court order for any reason. *Winkler*, 539 N.W.2d at 828. As such, Emigrant requests the Court affirm the district court's order on the merits in addition to the other reasons set forth herein.

A. Appellant failed to state a claim for Fraud, Misrepresentation, and Negligent Misrepresentation (Counts 1 and 2).

In order to establish and maintain an action for fraud, a Appellant must show: 1) that the accused made "a false representation of a past or existing material fact susceptible of knowledge, 2) knowing it to be false, or as of his own knowledge without knowing whether it is true or false, 3) with the intention to induce the person to whom it is made to act in reliance upon it, and 4) such person is thereby deceived and induced to act in reliance upon it, to his pecuniary damage." *Swanson v. Domning*, 86 N.W.2d 716, 720 (Minn. 1957). Fraud claims must be pled with particularity. Minn. R. Civ. P. 9.02 (2012); *Westgor v. Grimm*, 318 N.W.2d 56 (Minn. 2001). Dismissal of fraud claims is required when the claims are wholly unsupported by fact and based solely on conclusory allegations. *In re Milk Indirect Purchaser*, 588 N.W.2d 772, 775 (Minn. App. 1999).

To state a claim for intentional misrepresentation under Minnesota law, a Appellant must allege: (1) the defendant made a representation; (2) the misrepresentation was false; (3) it had to do with a past or present fact; (4) the fact was material; (5) the fact was susceptible of knowledge; (6) the defendant knew it was false or, in the alternative, asserted is as of his own knowledge without knowing whether it was true or false; (7) the defendant intended to induce the Appellant to act; (8) the Appellant was induced to act; (9) the Appellant acted in reliance on the representation; (10) the Appellant was *18 damaged; and (11) the damage was attributable to the representation. *M.H. v. Caritas Family Services*, 488 N.W.2d 282, 289 (Minn. 1992).

In order to plead a claim for negligent misrepresentation under Minnesota law, a Appellant must allege, among other things, that defendant owed a duty of reasonable care to the Appellant. See *M.H.*, 488 N.W.2d at 287. Lenders owe no fiduciary duty

to a borrower unless the “bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him.” *Klein v. First Edina Nat'l Bank*, 196 N.W.2d 619, 623 (Minn. 1972). Particularly in a banking relationship, the Minnesota Supreme Court has long since ruled that banks do not owe fiduciary duties to their customers. *Boubelik v. Liberty State Bank*, 553 N.W.2d 393-401-02 (Minn. 1996); *Vacinet v. First National Bank of Pine City*, 416 N.W.2d 795, 799 (Minn. Ct. App. 1987). The court in *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 179 (Minn.App.1986) stated the rule as follows:

We believe the correct rule to be that when a bank transacts business with a depositor or other customer, *it has no special duty to counsel the customer and inform him of every material fact relating to the transaction--including the bank's motive*, if material, for participating in the transaction... . (emphasis added).

Hunter has failed to plead her claims for fraud, misrepresentation, and negligent misrepresentation with particularity as required by Minnesota Law. Hunter merely makes several conclusory allegations that the Inver Grove Property should not have been encumbered by the Mortgage based on nothing more than her recollection of what she thought should have happened over eight years ago in 2004. Hunter has not provided specific facts to support her claims and is unable to point to any written documentation *19 supporting her claims. The only documents she references in her Complaint are the Mortgage and Rider “E”, both of which were executed on February 6, 2004 and expressly reference the Inver Grove Property as being encumbered by the Mortgage. Those documents were recorded with the Offices of the Washington and Dakota County Recordors exactly as executed by Hunter in 2004. The Complaint is completely void of any facts to support a claim for fraud and, as a result, Hunter's claims in Counts 1 and 2 must be dismissed with prejudice.

Claims of fraud, misrepresentation, and negligent misrepresentation all require that a representation of fact be made and that the representation is false. Emigrant, or its predecessor Anchor Bank, never made a representation that the Mortgage would not encumber the Inver Grove Property. Hunter would not have received the benefit of the loan proceeds and the Mortgage would never have been approved if the Inver Grove Property had not been included as collateral. Without the existence of a false representation, Hunter's claims for fraud, misrepresentation, and negligent misrepresentation must fail.

Hunter's claim for negligent misrepresentation in Count 2 of her Complaint requires that a duty of reasonable care was owed to her. Emigrant and Anchor Bank, as lenders, owed no duty to Hunter, as borrower, under Minnesota Law. Emigrant and Anchor Bank were not required to counsel Hunter on the material facts relating to the Mortgage. Without the existence of duty of reasonable care, Count 2 of Hunter's Complaint must be dismissed with prejudice.

***20 B. Appellant failed to state a claim for Promissory Estoppel (Count 3).**

Appellant is seeking a release of the Inver Grove Property under the doctrine of promissory estoppel. The doctrine of promissory estoppel will allow enforcement of a promise in law when no contract exists in fact. *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 593 (Minn. 1975). Generally, promissory estoppel is not available when a contract exists. *Gorham v. Benson Optical*, 539 N.W.2d 798, 801 (Minn. App. 1995). In order to prevail on a promissory estoppel claim, a party must prove the four elements:

1. The existence of a clear and definite promise;
2. The intention of the promisor to induce the promisee to rely on the promise;
3. The promisee's detrimental reliance on the promise; and
4. That enforcement of the promise is required to prevent injustice.

Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992). The language of promissory estoppel is permissive because courts may limit relief as justice requires. *Dallum v. Farmers Union Cent. Exch. Inc.*, 462 N.W.2d 608, 613 (Minn. Ct. App. 1990). “The Minnesota Court of Appeals specifically stated that ‘relief may be limited to the party’s out-of-pocket expenses made in reliance on the promise.’” *Id.* There are limits, however, to the application of promissory estoppel in that the first element requires that the promisor should reasonably expect to induce action or forbearance on the part of the promisee. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000).

Appellant has failed to satisfy these four elements. Hunter alleges that Anchor Bank made a promise to her that the Mortgage would not encumber the Inver Grove Property. First, Hunter has not alleged that Emigrant made a promise of any kind, thereby making her claim for promissory estoppel fail as against Emigrant without further *21 analysis. However, because Emigrant is a successor in interest to Anchor Bank and has an interest in the Mortgage, Emigrant is entitled to a dismissal of Hunter’s claims in their entirety.

Promissory estoppel applies when no contract exists. Here, a contract indisputably does exist. Hunter has not alleged that the Note and Mortgage should not have been entered into, only that the Mortgage improperly encumbers the Inver Grove Property. As such, the doctrine of promissory estoppel is inapplicable to the facts of this case. *Gorham*, 539 N.W.2d 798 at 801; *Del Hayes*, 230 N.W.2d at 593.

C. Appellant failed to state a claim for Mutual Mistake of Fact (Count 4).

Appellant has asserted that the Inver Grove Property should be released from the Mortgage due to a mutual mistake of the parties. (App at pg. 5.) In order to successfully plead a cause of action for mutual mistake, the party claiming mistake must prove: 1) the parties reached an agreement with respect to the actual terms of the agreement; 2) the written agreement doesn’t actually express the agreed-upon terms; 3) and the mistake was mutual. *Nichols v. Shelard Nat. Bank*, 294 N.W.2d 730, 734 (Minn. 1980). The evidence in support of reformation must be “clear and consistent, unequivocal and convincing.” *Id.*

Further, Emigrant and Anchor Bank have both asserted there was no mutual mistake of the parties because the Mortgage was intended to encumber both the Newport Property and the Inver Grove Property. The documents reflect Respondents’ understanding of the agreement and, as such, reformation through the doctrine of mutual mistake is unavailable to Appellant. *Id.* This is further evidenced by the fact Anchor *22 Bank secured two loan commitments in 2003 prior to execution of the Mortgage to verify that the Mortgage would be a first lien against each of the respective properties. (E-App at pgs. 029-038.) Each title commitment carried a policy limit of \$132,500.00, and when added together, provided coverage for the entire amount of the \$265,000.00 loan. (*Id.*) Anchor Bank, from the initial stages of the loan underwriting process, intended for both the Newport Property and Inver Grove Property to be encumbered by the Mortgage.

Further, it is clear even Hunter intended to encumber both properties despite her allegations to the contrary in this lawsuit. In Hunter’s August 21, 2005 letter to Emigrant she also referenced her understanding that the Inver Grove Property was encumbered by the Mortgage as “cross-collateral.” (*Id.* at pg. 039.) Hunter understood that the Inver Grove Property was encumbered and her request to have Emigrant release the Inver Grove Property from the Mortgage provides additional evidence to show that even Hunter was aware that the Inver Grove Property was required as additional collateral before Anchor Bank would qualify her for the Mortgage. (*Id.*) Her failure to read the documents, which she now claims were not supposed to encumber both properties is not a valid reason to reform the Mortgage. *Nichols*, 294 N.W.2d at 734.

Clearly, the evidence Hunter offers in support of reformation based upon mutual mistake is not clear, consistent, unequivocal and convincing as required by the Court in *Nichols*. *Id.* Because there was no mutual mistake of the parties in this situation, Count 4 of Appellant’s Complaint was properly dismissed and the district court’s decision should be upheld.

***23 CONCLUSION**

Based upon the foregoing, Emigrant respectfully requests the Court affirm the district court's order. The foreclosure sale, which Hunter challenges, is valid based upon long-standing decisions from the Minnesota Supreme Court and Hunter has failed to provide any good cause sufficient to vacate the sale. Further, the district court properly dismissed all of the counts based upon the parol evidence rule and Minnesota's Credit Agreement Statute, issues which are not before this Court. The district court also properly dismissed each claim on the merits. The reality is that Hunter knowingly entered into the Mortgage that encumbered two properties, defaulted on the Mortgage six years later, and is trying to keep her homestead through any means available. Unfortunately for Appellant, the facts do not support the relief she requests and the district court's order should be upheld.

Appendix not available.

Footnotes

- 1 The substantive arguments addressing Hunter's claim that the mortgage foreclosure sale must be set aside are addressed in Section I of this Brief.
- 2 Hunter also asserted a cause of action for **Financial Exploitation** of a Vulnerable Adult (Count 6) in her initial Complaint. It does not appear that cause of action was asserted against Emigrant, which Appellant alleged in its Motion to Dismiss. Hunter did not raise a defense to this assertion in her Memorandum of Law in Opposition to defendants' Motion to Dismiss or Alternatively for Summary Judgment and the Court dismissed the cause of action. Hunter did not appeal that dismissal and that issue is not before this Court.
- 3 The substantive arguments addressing Hunter's claim that the mortgage foreclosure sale must be set aside are addressed in Section I of this Brief.

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